



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

July 11, 2003

Ref: 8ENF-T

CERTIFIED

MAIL

RETURN RECEIPT REQUESTED

William B. Hayes
Registered Agent for Westwoods Development Company, LLC
237 Jackson Street
Denver, CO 80202

Re: Notice of Proposed Assessment of
Civil Penalty, Docket No. **CWA-08-2003-0074**
Facility Permit No. COR-032752

Dear Mr. Hayes:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against Westwoods Development Company, LLC (Westwoods) pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that Westwoods has violated section 301(a) of the Act, 33 U.S.C. § 1311(a), and the storm water requirements specified in its Colorado Discharge Permit System ("CDPS") permit No. COR-032752. The Complaint proposes that a penalty of \$48,000 be assessed against Westwoods for these violations.

You have the right to a hearing to contest the factual allegations in the Complaint or the appropriateness of the proposed administrative penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in civil penalty assessments.

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of your receipt of the enclosed Complaint to the EPA Region VIII Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA, Region VIII
999 18th Street, Suite 300
Denver, Colorado 80202-2466

If you do not file an answer within 30 days [see 40 C.F.R. § 22.15(d)], you may be found in default. A default judgment may impose the full penalty proposed in the Complaint (\$48,000).



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EPA encourages the consideration of Supplemental Environmental Projects (SEPs) in conjunction with civil penalties, in the settlement of civil enforcement cases. In case you are interested in this possibility, we have enclosed a copy of the EPA policy that describes the possibilities and limitations of SEPs in such matters. An agreement to perform a SEP may result in a lower cash penalty amount.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations (See 40 C.F.R. § 22.18). If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by you and the delegated authority for EPA. Upon final approval of the consent agreement by the Regional Judicial Officer, Respondent will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. SBREFA does not eliminate your responsibility to comply with the Act and respond to this Complaint, nor does it create any new rights or defenses under law.

If you have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to compliance with the Act, the most knowledgeable people on my staff regarding these matters are Julie Orr, Technical Enforcement, at (303) 312-6225 or David J. Janik, Supervisory Enforcement Attorney, at (303) 312-6917. If you are represented by an attorney, or to request a settlement conference, please call Mr. Janik. Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. Part 22)
3. Supplemental Environmental Projects Policy
4. Small Business Regulatory Enforcement and Fairness Act Information
5. Memo from CDPHE

cc: Tina Artemis, Regional Hearing Clerk
Mark Pifher, CDPHE

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No. CWA-08-2003-0074**

In the Matter of:)	
)	
Westwoods Development Company, LLC)	PENALTY COMPLAINT AND NOTICE OF
a Colorado Corporation,)	OPPORTUNITY FOR HEARING
)	
)	
Respondent.)	

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act). 33 U.S.C. 1319(g). The Environmental Protection Agency (EPA) regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA official has been properly delegated the authority to issue this action. EPA has consulted with the State as required by the Act. 33 U.S.C. 1319(g)(1).

3. EPA alleges that Respondent has violated the Act, permit and/or regulations and proposes the assessment of a civil penalty, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact stated (alleged) by EPA in the complaint, (2) the grounds for any legal defense or (3) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (999 18th Street; Suite 300 (8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT’S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE**

**PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM
AUTHORIZED BY THE ACT.**

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the penalty amount proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ; extension 6917 or 303-312-6917] or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to all times relevant to this action, and to each count of this complaint:

8. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act prohibits the discharge of pollutants into navigable waters of the United States, unless it is in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).

9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA or State, to permit discharges into navigable waters, subject to specific terms and conditions. 33 U.S.C. § 1342.

10. The Act requires that a discharge of storm water associated with an industrial activity to navigable waters must comply with the requirements of an NPDES permit. 33 U.S.C. § 1342(p).

11. The Act authorized, and EPA issued, regulations that further define requirements for NPDES permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are found at 40 C.F.R. part 122.

12. EPA regulations define discharges associated with industrial activity to include construction activity. 40 C.F.R. § 122.26(b)(14)(x).

13. EPA regulations require each person who discharges storm water associated with industrial activity to either apply for an individual permit or seek coverage under an existing and lawful general permit. 40 C.F.R. § 122.26(c).

1 14. The State of Colorado has lawfully issued a general permit, under the authority of State
2 law and the Act, which authorizes the discharge of storm water associated with construction
3 activities, if done in compliance with the conditions of the permit. The State of Colorado issued
4 permit no. COR- 032752 to Ralston Development Corp. on June 21, 2002, which provided
5 coverage under COR-030000. Colorado permit no. COR-030000; attached as exhibit A (“permit”).
6

7 15. The permit requires, among other things, that a person discharging pollutants develop
8 and implement an adequate storm water management plan (SWMP), conduct regular specified
9 storm water inspections, and implement best management practices (“BMPs”), etc. BMPs include
10 structural controls (such as sediment ponds and silt fences) and management practices (such as a
11 dedicated concrete washout area and street sweeping).
12

13 16. Respondent is a corporation, incorporated in the State of Colorado, and doing business
14 in the State of Colorado.
15

16 17. Respondent is a “person” within the meaning of section 502(5) of the Act, and
17 therefore subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).
18

19 18. Respondent owns or was engaged in construction activities at a facility located at
20 15200 West 64th Ave., Arvada, Colorado (McIntyre Street and 64th Avenue), (“facility”).
21

22 19. Respondent engaged in construction activities at the facility at all times relevant to this
23 action.
24

25 20. Respondent is therefore engaged in an “industrial activity” as defined by EPA
26 regulations. 40 C.F.R. § 122.26(b)(14).
27

28 21. Storm water, snow melt, surface drainage and run off water leaves Respondent’s
29 facility and goes into Farmers High Line Canal.
30

31 22. The run off and drainage from Respondent’s facility is “storm water” as defined by
32 EPA regulations. 40 C.F.R. § 122.26(b)(13).
33

34 23. Storm water contains “pollutants” as defined by the Act. 33 U.S.C. § 1362(6).
35

36 24. Farmers High Line Canal eventually drains to Stanley Lake, then to Clear Creek, a
37 “navigable water” and “waters of the United States,” as defined by the Act and EPA regulations,
38 respectively. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.
39

40 25. Respondent’s storm water runoff is the “discharge of a pollutant” as defined by EPA
41 regulations. 40 C.F.R. § 122.(b)(14)(x).
42

43 26. An authorized EPA employee entered the facility with the consent of Respondent on
44 October 3, 2002 to inspect it for compliance with the statute, permit and regulations. The counts
45 below outline violations confirmed by the inspector.
46

47 27. Construction activities disturbing over five acres commenced at the facility on or about
48 May 22, 2003.

1 28. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require
2 that a storm water permit be obtained for construction activity including clearing, grading and
3 excavation disturbing at least five acres. Respondent is covered under the permit and subject to its
4 terms and conditions.

5
6 **COUNT 1**
7

8 29. Respondent failed to conduct inspections as required by the permit.
9

10 30. Respondent's failure to conduct inspections as required by the permit constitutes a
11 violation of the Act. 33 U.S.C. § 1319, § 1342(p).
12

13 **COUNT 2**
14

15 31. At the time of that inspection, Respondent's SWMP did not contain the following
16 required components: an adequate site description, site map, a description of BMPs which clearly
17 describes in what construction phase each BMP will be implemented, information on final
18 stabilization and long-term storm water management and inspection and maintenance procedures.
19

20 32. Respondent's failure to develop a complete SWMP as required by the constitutes a
21 violation of the Act. 33 U.S.C. § 1319(p).
22

23 **COUNT 3**
24

25 33. The permit requires Respondent to implement best management practices (BMPs) in
26 order to minimize the impact of Respondents construction activities on waters of the United States.
27 At the time of that inspection, the following BMPs were not in place or were not being
28 implemented: vehicle track-out pads were not maintained and storm water inlets were not
29 adequately protected.
30

31 34. Respondent's failure to implement BMPs as required by the permit and therefore the
32 Act. 33 U.S.C. § 1319, § 1342(p).
33

34 **PROPOSED CIVIL PENALTY**
35

36 35. The Act authorizes the assessment of a civil penalty of up to \$27,500 per day, for each
37 violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the
38 following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the
39 violation; Respondent's prior compliance history of such violations; Respondent's culpability for
40 the violation; any economic benefit or savings gained from the violation; and other factors that
41 justice may require.
42

43 36. In light of the statutory factors and the specific facts of this case, EPA proposes that a
44 penalty of \$48,000 be assessed against Respondent for the violations alleged above, as explained
45 below:
46

47 Nature, Circumstances, Extent, and Gravity of Violations
48

Respondent had control of storm water management at the facility beginning in the May of 2002. EPA's October 3, 2002 inspection documented that the SWMP did not reflect current site conditions. EPA's October 3, 2002 inspection and Respondent's response to the inspection revealed the following components were missing from the SWMP: an adequate site description, site map, a description of BMPs which clearly describes in what construction phase each BMP will be implemented, information on final stabilization and long-term storm water management and inspection and maintenance procedures. The EPA inspection revealed the following BMPs were not in place or were not being sufficiently implemented: vehicle track out pads, and BMPs to adequately protect storm water inlets.

Prior Compliance History

This Order is the first enforcement actions EPA Region 8 has issued to Respondent requiring compliance with the applicable storm water regulations.

Degree of Culpability

Respondent had a copy of the storm water permit, and should have been aware of all the requirements therein.

Economic Benefit

An economic benefit was experienced by Respondent for failure to comply with the storm water permit. Specifically, Respondent benefitted by not spending the required funds to develop an adequate SWMP, develop and implement adequate BMPs, and conduct required inspections. Additional information may be collected in regard to this factor supporting a greater penalty adjustment.

Ability to Pay

EPA did not reduce the proposed penalty due to this factor, but will consider any new information Respondent may present regarding Respondent's ability to pay the penalty proposed in this Complaint.

Other Matters that Justice may Require

No adjustments made regarding these factors at this time.

37. As required by the Act, prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).

38. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and may assess a penalty above the proposed amount, up to the \$27,500 per day per violation authorized in the statute.

To discuss settlement or ask any questions you may have about this case or process, please

Westwoods Development Company, LLC 8
Administrative Penalty Complaint
Docket No.

1 contact David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the address below.
2

3 United States Environmental Protection Agency
4 Region 8, Office of Enforcement, Compliance and
5 Environmental Justice, Complainant
6 999 18th Street, Suite 300 (ENF-L)
7 Denver, CO 80202
8
9

10
11 Date: 7/9/03

12 By: SIGNED
13 Carol Rushin
14 Assistant Regional Administrator
15
16
17

18 SIGNED
19 David J. Janik, Supervisory Enforcement Attorney
20 Legal Enforcement Program
21

22 **IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE**
23 **REGIONAL HEARING CLERK.**
24

25 **THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.**